Ooi Choo Hock v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–338 OF 2010
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
28 OCTOBER 2013

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Conviction for three charges of trafficking and two charges of possession of dangerous drugs — Conviction for three charges of trafficking and two charges of possession of dangerous drugs — Accused sentenced to death for trafficking and imprisonment and ten strokes of rotan for possession — Dangerous Drugs Act 1952 — Appeal against decision of High Court — Whether court should invoke s 60(1) of the Courts of Judicature Act 1964 and dismiss appeal

D

Criminal Procedure — Exhibits — Evidence — Discrepancies — Various discrepancies relating gross weight of drugs — Whether prosecution ventured explanation for discrepancies

E

Criminal Law — Dangerous drugs — Possession — Dangerous drugs recovered from apartment — Whether accused sole person who had access to apartment — Evidence of third party staying in apartment — Whether there was exclusivity of possession — Whether accused could be said to have knowledge and possession of dangerous drugs found — Whether prosecution successful in establishing prima facie case

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In the High Court, the appellant was convicted for three charges of trafficking and two charges for possession of the dangerous drugs. In respect of the three trafficking charges, he was sentenced to death while for the two possession charges, the appellant was sentenced to seven years imprisonment and ten strokes of rotan. Aggrieved by the said decision, the appellant appealed. Briefly the facts were, the police party entered an apartment by prying open the windows of an apartment and the appellant was found standing at the balcony. SP6 and the team of police officers conducted a thorough search of the apartment and found paraphernalia of tools and substances believed to be used for the purpose of processing drugs. The substances were then analysed by a government chemist and confirmed to be dangerous drugs. It was the appellant's defence that he rented the apartment for his cousin ('SP11') through one Peter Tye ('SP9'). On that fateful day, SP11 had left the keys with the appellant's ex-wife ('SD2'). Some time in afternoon of the same day, SD2

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had asked the appellant to check the said apartment as she saw a few men standing in front of the it earlier. The appellant alleged that he went in to check and locked the apartment from inside. He saw a lot of items lying on the floor and as he could not bear the unpleasant smell of acid in the living room, the appellant went to the balcony. It was at this juncture that he was ambushed and arrested by the police. The appellant denied knowledge and possession of the dangerous drugs found. In the present appeal, the appellant submitted that the case for prosecution revealed several unexplained discrepancies with regard to the drug exhibits. The prosecution, on the other hand, invited the court to invoke s 60(1) of the Courts of Judicature Act 1964 ('CJA') and dismiss the appellant's appeal.

Held, allowing the appeal:

(1) To sustain a conviction for possession or trafficking, the prosecution must prove exclusivity of possession. The prosecution called the owner of the apartment, SP11, to show that the apartment was rented to the appellant orally and a set of keys was handed over to the appellant through SP9. However, the pertinent question was whether the set of keys that was handed over to the appellant was the only set of keys to the apartment and whether SP11, as the owner, had kept a separate set of duplicate keys. This question remained unanswered. In fact, the prosecution had acknowledged the existence of a third party tenant staying at the apartment (see paras 28, 34–35).

(2) The discrepancies related to the gross weight of drugs and were so serious that they struck at the very core of the prosecution's case. The discrepancies of the gross weight came up to 407.92g and it was a huge amount and the prosecution ventured no explanation for the various discrepancies highlighted. With these inherent discrepancies, there was no prima facie case and the defence should not have been called. Since the contemporaneous documents contradicted one another, the effect was that there was no credible evidence tendered by the prosecution. Material contradictions or discrepancies or omissions must be construed in favour of the defence (see paras 69–70).

(3) There was a substantial miscarriage of justice. Section 60(1) of the CJA should not be invoked as the prosecution failed to establish a prima facie case and the serious doubts as to the identity of the drug exhibits impinged on the prosecution case. The convictions and sentences imposed by the High Court judge was set aside and the appellant was acquitted and discharged from all charges (see paras 80–81).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu telah disabitkan dengan tiga pertuduhan mengedar dan dua tuduhan kerana memiliki dadah berbahaya. Berhubung

dengan tiga tuduhan mengedar, beliau telah dihukum mati manakala bagi dua tuduhan pemilikan, perayu dijatuhi hukuman tujuh tahun penjara dan sepuluh sebatan. Terkilan dengan keputusan itu, perayu membuat rayuan. Secara ringkas fakta-fakta adalah, pihak polis memasuki apartmen dengan mencungkil tingkap apartmen dan perayu didapati berdiri di balkoni. SP6 dan pasukan pegawai polis mengeledah teliti apartmen dan mendapati kelengkapan alat dan bahan-bahan yang dipercayai digunakan untuk tujuan memproses dadah. Bahan-bahan kemudiannya dianalisa oleh ahli kimia kerajaan dan disahkan sebagai dadah berbahaya. Ia adalah pembelaan perayu bahawa dia menyewa apartmen untuk sepupunya ('SP11') melalui Peter Tye ('P9'). Pada hari itu, SP11 telah meninggalkan kunci dengan bekas isteri perayu ('SD2'). Pada petang hari yang sama, SD2 telah meminta perayu untuk memeriksa apartmen tersebut kerana beliau melihat beberapa orang lelaki berdiri di hadapannya yang lebih awal. Perayu mendakwa bahawa dia pergi dalam untuk memeriksa dan mengunci apartmen dari dalam. Dia melihat banyak barangan di atas lantai dan kerana dia tidak tahan bau yang tidak menyenangkan asid di ruang tamu, perayu pergi ke balkoni. Ia adalah pada ketika ini bahawa dia telah diserang hendap dan ditangkap oleh pihak polis. Perayu menafikan pengetahuan dan pemilikan dadah berbahaya dijumpai. Dalam rayuan ini, perayu berhujah bahawa kes pendakwaan menunjukkan beberapa percanggahan yang tidak dapat dijelaskan berkenaan dengan ekshibit dadah. Pendakwaan, sebaliknya, meminta mahkamah untuk menggunakan s 60(1) Akta Mahkamah Kehakiman 1964 ('AMK') dan menolak rayuan perayu.

Diputuskan, membenarkan rayuan:

(1) Untuk mengekalkan sabitan bagi pemilikan atau pengedaran, pihak pendakwaan mesti membuktikan pemilikan eksklusif. Pendakwaan memanggil pemilik apartmen, SP11, untuk menunjukkan bahawa apartmen itu disewa kepada perayu secara lisan dan satu set kunci telah diserahkan kepada perayu melalui SP9. Walau bagaimanapun, soalan penting ialah sama ada set kunci yang diserahkan kepada perayu adalah satu-satunya set kunci untuk apartmen dan sama ada SP11, sebagai pemilik, telah menyimpan set kunci pendua berasingan. Soalan ini masih tidak terjawab. Malah, pihak pendakwaan telah mengakui kewujudan seorang penyewa pihak ketiga tinggal di apartmen itu (lihat perenggan 28, 34–35).

(2) Percanggahan berkaitan dengan berat kasar dadah dan begitu serius sehinggakan ia menyerang pada teras kes pendakwaan. Percanggahan berat kasar membawa kepada 407.92g dan ia adalah satu jumlah yang besar dan pihak pendakwaan tidak berusaha untuk memberi sebarang penjelasan bagi beberapa percanggahan yang ditekankan. Dengan adanya percanggahan, tidak ada kes prima facie dan pembelaan tidak sepatutnya dipanggil. Memandangkan dokumen semasa bercanggah satu

sama lain, kesannya adalah bahawa tidak ada keterangan yang boleh dipercayai dikemukakan oleh pihak pendakwaan. Percanggahan material atau perselisihan atau peninggalan mestilah ditafsirkan memihak kepada pembelaan (lihat perenggan 69–70).

(3) Terdapat salah laksana keadilan yang substansial. Seksyen 60 (1) AMK tidak sepatutnya digunakan kerana pihak pendakwaan gagal membuktikan kes prima facie dan keraguan yang serius tentang identiti ekshibit dadah yang meninggalkan kesan kepada kes pendakwaan. Sabitan dan hukuman yang dikenakan oleh hakim Mahkamah Tinggi telah diketepikan dan perayu dilepaskan dan dibebaskan daripada semua pertuduhan (lihat perenggan 80–81).]

Notes

For a case on possession, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 195.

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222

For cases on evidence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2046–2052.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)
Abillah bin Labo Khan v PP [2002] 3 MLJ 298; [2002] 3 CLJ 521, CA (refd)
Adzhaar bin Ahmad & Anor v PP [1996] 4 MLJ 85, HC (refd)
Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Arumugam Periasamy v PP [2005] 3 CLJ 685, CA (refd)
Chan Kheng Nam lwn PP [2002] 1 CLJ 553, CA (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)
Harchand Singh and another v State of Haryana AIR 1974 SC 344 (refd)
Haryadi bin Dadeh v PP [2000] 4 MLJ 71; [2000] 3 AMR 3396, FC (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 4 AMR 709, FC (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322, SC (distd)
Mat v PP [1963] 1 MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Mohd Taufiq Mani b Abdullah lwn Pendakwa Raya [2002] 1 AMR 877, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
PP v Muhamad Suhaimi bin Abdul Aziz [2002] 5 MLJ 233; [2002] 2 CLJ 209, HC (refd)

Pang Chee Meng v PP [1992] 1 MLJ 137, SC (distd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)
Periasamy v PP [1966] 1 MLJ 138, FC (refd)
PP v Abang Abdul Rahman [1982] 1 MLJ 346 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Lee Eng Kooi [1993] 2 MLJ 322; [1993] 2 CLJ 534, HC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561; [1992] 1 CLJ (Rep) 285, SC (refd)
PP v Low Aik Boon (2) [1990] 2 CLJ (Rep) 760, HC (refd)
PP v Rajandiran a/l Kadirveil [2002] 7 MLJ 77, HC (refd)
PP v Tai Mei Yuen [2004] 4 MLJ 541, HC (refd)
Pichi Muthu, Re [1970] 2 MLJ 143 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 AMR 577, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Yusoff bin Kassim v PP [1992] 2 MLJ 183, SC (refd)
Zaifull bin Muhammad v PP and another appeal [2013] 2 MLJ 348, FC (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 60(1), 92(1)
Criminal Procedure Code s 112
Dangerous Drugs Act 1952 ss 12(3), 37(da), 39A(2)

Appeal from: Criminal Trial Nos 45–46 of 2003 and 45–47 of 2003 (High Court, Pulau Pinang)

Gooi Soon Seng (Gooi & Azura) for the appellant.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Madam Azlina binti Rasdi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent/public prosecutor.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged in the High Court at Penang with five charges under the Dangerous Drugs Act 1952 ('DDA'). Three of the charges were for trafficking in the dangerous drugs, while the other two charges were for possession of the dangerous drugs. In its original text, the charges were drafted as follows:

[2] For Criminal Trial No 45–46 of 2003:

The first charge

Bahawa kamu pada 8 Oktober 2002, jam lebih kurang 5.00 petang, di alamat Blok 23–11–18, Taman Lone Pine, Air Hitam, dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 576.4 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The second charge

Bahawa kamu pada 8 Oktober 2002, jam lebih kurang 5.00 petang, di alamat Blok 23–11–18, Taman Lone Pine, Air Hitam, dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah didapati dalam milikan kamu dadah berbahaya iaitu Monoacetylmorphines seberat 7.6 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39A(2) Akta yang sama.

The third charge

Bahawa kamu pada 8 Oktober 2002, jam lebih kurang 5.00 petang, di alamat Blok 23–11–18, Taman Lone Pine, Air Hitam, dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah didapati dalam milikan kamu dadah berbahaya iaitu Ketamine seberat 45.1 gram dan dengan itu kamu teiah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) Akta yang sama.

[3] For Criminal Trial No 45–47 of 2003:

The first charge

Bahawa kamu pada 8 Oktober 2002, jam lebih kurang 5.00 petang, di alamat Blok 23–11–18, Taman Lone Pine, Air Hitam, dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 128.4 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The second charge

Bahawa kamu pada 8 Oktober 2002, jam lebih kurang 5.00 petang, di alamat Blok 23–11–18, Taman Lone Pine, Air Hitam, dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu Ketamine seberat 411.4 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[4] The High Court at Penang convicted the appellant on all the five charges. In respect of the three trafficking charges, the appellant was sentenced to death. With regard to the possession charges, the appellant was sentenced to seven

years imprisonment and ten strokes of the rattan (for possession punishable under s 39A(2) of the DDA), and three years imprisonment for possession punishable under s 12(3) of the DDA. The sentences for both the possession charges were to commence from 8 October 2002.

[5] Aggrieved, the appellant now appeals to this court.

THE CASE FOR THE PROSECUTION

[6] On 8 October 2002 at approximately 3pm, ASP Lee Choon Peng ('SP6') led a police party comprising of Corporal RF 140527 Badri bin Mat Esa ('SP7'), Detective Corporal Suhaimi and Detective Corporal Ahmad Daud to an apartment at Block 23–11–18, Taman Lone Pine, Air Itam, in the district of Timur Laut, in the State of Pulau Pinang. Upon arrival at Block 23, SP6 and his police party kept surveillance from the car park area.

[7] At approximately 5pm on the same day, SP6 and two of his police personnel walked up the flight of stairs to the 11th floor of Block 23, while SP7 was directed by SP6 to remain at the ground floor and to keep an eye as to whether the suspect at Block 23–11–18 would throw anything downstairs.

[8] On reaching the apartment on the 11th floor at unit No 18 of Block 23, SP6 found that the grille and the wooden door of the apartment were locked. SP6 knocked at the door and identified himself as a police officer, but there was no response.

[9] SP6 tried to gain access but was prevented by the grille door which was padlocked and it was difficult to cut open the grille door or to pry it open. Accompanied by Detective Corporal Ahmad Daud, SP6 managed to gain access by prying open the naco louvre windows of the kitchen which was not covered by any grille as seen in the sketch plan marked as exh 'P63' at 'N' and in the coloured photographs marked as exh 'P6J' and 'P6K'. Meanwhile, Detective Corporal Suhaimi was directed by SP6 to guard the front door to the said apartment.

[10] Upon gaining entry inside the unit No 18, SP6 proceeded to the living room area and saw the joss-stick at the prayer area at point 'C' of the sketch plan at 'P62' was burning slowly. More of a smouldering flame. SP6 then examined the two rooms in the said apartment and found no one there.

[11] SP6 suspected that someone was standing at the balcony of the said apartment when SP6 saw a pair of legs at the balcony door. After ensuring that Detective Corporal Ahmad Daud was put on alert, SP6 opened the door to the

balcony and saw the appellant standing there alone. SP6 placed the appellant under arrest and subsequently handcuffed him. The appellant was then taken to the living room area of the said apartment.

[12] At this juncture, SP6 asked the appellant about the whereabouts of the keys to the said apartment and SP6's query was duly answered by the appellant. After opening the grille and the front door to the said apartment by using the keys found by SP6 based on the appellant's direction and having let in detective corporal Suhaimi who was guarding the front door, SP6 proceeded to conduct a thorough search of the said apartment in the presence of the appellant and found, in the second room, a paraphernalia of tools and substances believed to be used for the purpose of processing drugs. Altogether there were 23 items that were seized from the second room as seen in the 'senarai pemeriksaan' marked as exh 'P63' at items 1 to 23 which included a machine to process 'estacy pills'. In the first room, SP6 also found six more items of tools and substances meant to process drugs as seen in the 'senarai pemeriksaan' marked as exh 'P63' at items 24 to 29 which also included a machine to process 'estacy pills'.

[13] In the living room, SP6 found 59 other tools and substances suspected to be used for processing drugs as reflected in the 'senarai pemeriksaan' marked as exh'P63' at items 30 to 44 which included those items listed at item 44: 27.1 to 27.17.

[14] In addition to all these, SP6 also seized the identity card of the appellant, five keys to the said apartment and one handphone.

[15] Of crucial importance to the five charges, SP6 found in the said apartment:

(a) two plastic packets containing substances suspected to be dangerous drugs as per exh 'P17' and 'P18' found lying on the floor in the second room marked as 'G' in the sketch plan 'P62'; and

(b) a number of plastic boxes and plastic packets containing substances suspected to be dangerous drugs as per exhs 'P19' to 'P44' found in the living room.

[16] SP6 and his police party brought all the exhibits seized as well as the appellant to the police station at Pulau Pinang and there, SP6 lodged a police report vide Bandar Baru Report No 1986/2002 as seen in exh 'P64'. SP6 also handed the exhibits and the appellant to ASP Azman bin Mohd Isa ('SP8'), the investigating officer of the case.

[17] In due course, the government chemist by the name of Shaharudin bin

Hasan ('SP4') analysed the exhibits and confirmed that they were dangerous drugs as listed in the First Schedule to the DDA (see the chemist report marked as exh 'P15').

[18] In exhs 'P17' and 'P18', SP4 confirmed that it contained 128.4g of methamphetamine which is the subject matter of the first trafficking charge in Criminal Trial No 45–47 of 2003, and it also contained 411.4g of ketamine which is the subject matter of the second trafficking charge in Criminal Trial No 45–47 of 2003.

[19] In exhs 'P19' to 'P44', SP4 confirmed that it contained 576.4g of methamphetamine which formed the subject matter of the first trafficking charge in Criminal Trial No 45–46 of 2003, and it also made reference to 7.6g of monoacetylmorphines which formed the subject matter of the second charge for possession punishable under s 39A(2) of the DDA for Criminal Trial No 45–46 of 2003, and, finally, it also referred to 45.1g of ketamine which formed the subject matter of the third charge for possession punishable under s 12(3) of the DDA.

THE CASE FOR THE DEFENCE

[20] The appellant testified that he rented the apartment at Block 23–11–18 for his cousin by the name of Ong Gim Hooi ('Ah Hooi') through Peter Tye Wooi Seong ('SP9'). Ah Hooi had been staying at the said apartment with his girlfriend who is of Thai nationality since the year 2000. The rental of the apartment was collected by the appellant from Ah Hooi and thereafter, it was handed over to SP9 as Ah Hooi was frequently away for his 'underground business' of smuggling machinery. And that Ah Hooi would only be at home at night and that the said apartment would be locked in the daytime.

[21] According to the appellant, when Ah Hooi was away, Ah Hooi would deposit the apartment keys with the appellant or with the appellant's ex-wife by the name of Poh Hoay Leng ('SD2') in order for the latter to take care of the apartment as incidents of theft and housebreaking had been quite rampant in that area.

[22] On that fateful day — and that would be on 8 October 2002, Ah Hooi had left his apartment keys with SD2 before he left the said apartment. Sometime in the afternoon of the same day, SD2 asked the appellant to check the said apartment as she saw a few men standing in front of the said apartment earlier in the day. Acting on SD2's request, the appellant went to check and entered the said apartment. On entry, the appellant saw a lot of items lying on the floor of the living room in a haphazard manner. The appellant quickly locked the apartment from inside and he wanted to make a telephone call to Ah

Hooi because he suspected that those items were contraband goods belonging to Ah Hooi. Since Ah Hooi is the appellant's cousin, the appellant wanted to ask Ah Hooi to remove those items from the said apartment. As the appellant could not bear with the unpleasant smell of acid in the living room, he went to the balcony of the said apartment in order to make a telephone call to Ah Hooi.

[23] According to the appellant, when he was at the balcony of the said apartment, he was approached by a man who claimed to be a police officer and he was then arrested and handcuffed and brought to the living room area of the said apartment by that man. At that juncture, the appellant saw SD2 came into the said apartment accompanied by some police officers.

[24] The appellant denied any knowledge of any of the exhibits seized by the police from the said apartment and he too denied possession of any of those exhibits.

ANALYSIS

[25] When the High Court judge called the defence of the appellant, His Lordship must have been satisfied that the prosecution has made out a prima facie case against the appellant. To earn an acquittal, the defence needs to create a reasonable doubt in the prosecution's case (*Mat v Public Prosecutor* [1963] 1 MLJ 263; and *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169(SC).

[26] 'Possession' is an essential ingredient for a charge of drug trafficking. In the absence of direct evidence of trafficking, the prosecution must prove the essential ingredient of 'possession' and the trial judge must make an affirmative finding of 'possession' before the presumption of trafficking under s 37(da) of the DDA can be invoked (*Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273(FC)).

[27] Here, it is apparent that the High Court judge had concluded that the appellant had custody and control over the drugs based on the following facts:

(a) that the appellant was the only person present in the apartment where the drugs were recovered on the date and time of arrest; and

(b) that the appellant rented the apartment from the owner by the name of Tan Chai Chong ('SP11') through SP9 at the material time.

[28] But, to sustain a conviction for possession or trafficking, the prosecution must prove exclusivity of possession. And it is not the duty of the defence to supplement the case for the prosecution (*Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 (SC)) if there are gaps in the prosecution's case.

[29] It was Thomson J in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, at p 239, who introduced the idea of exclusivity to the meaning of possession and this was what his Lordship said:

> On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention.

[30] The concept of exclusivity is now part of our law. It has received approval by our apex court.

[31] The Supreme Court in *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 held that there was no exclusive possession when there were three others who were sharing accomodation with the appellant where the drugs were found.

[32] Again, the Supreme Court in *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322 set aside the conviction of the appellant since there was a reasonable doubt as to the exclusive use of the room by the appellant, bearing in mind that there could have been others who have access to the appellant's room.

[33] *Pang Chee Meng* and *Lee Chee Meng* are two authorities emanating from the Supreme Court which categorically endorsed the principles of exclusive possession and exclusivity is also an issue in this appeal. Here, there is no affirmative evidence to prove that the appellant was exclusively in custody and control of the apartment, let alone that of the drugs, prior to his arrest.

[34] The prosecution called the owner of the apartment — in the person of SP11, to show that the apartment was rented to the appellant orally and a set of keys was handed over to the appellant through SP9. But pertinent questions of whether the set of keys that was handed over to the appellant is the only set of keys to the apartment and whether SP11, as the owner of the apartment, kept a separate set of duplicate keys to the apartment remain unanswered. These are important questions which are certainly relevant to the issue of exclusivity.

[35] Even the prosecution has acknowledged the existence of a third party tenant staying at the apartment when learned deputy public prosecutor suggested to the appellant during the appellant's cross-examination by the prosecution to the effect that the appellant has made a duplicate of the apartment keys before he handed them over to the tenant. At p 259 of the appeal record at *Jilid* III, the cross-examination of the appellant went like this:

> Q: Saya cadangkan pada masa awak terima kunci (daripada) Peter awak telah buat duplicate, satu awak pegang dan satu lagi awak serah kepada penyewa.

J: Tak setuju.

[36] To compound the matter further, there was evidence from SP8 —the investigating officer of the case, that two pants randomly seized by SP8 from the apartment did not fit the appellant. This meant that there was another person who had access to the apartment as well. At pp 197–198 of the appeal record at *Jilid* II, SP8 testified as follows:

> Manakala dua helai seluar tidak sesuai dengan OKT. Maksud saya seluar itu kecil daripada saiz OKT.

[37] The evidence of SP6, a very material witness, must be subjected to a maximum evaluation to determine the veracity and accuracy of his recollection of events. SP6 identified exh 'P61' as the apartment keys seized by him even though he did not make any marking on it. At p 158 of the appeal record at *Jilid* II, this was what SP6 said:

> Saya tidak ada membuat apa-apa tandaan ke atas lima batang anak kunci semasa diserahkan kepada Cif Inspektor Azman. Sepanjang masa hingga ke hari ini saya tidak ada membuat apa-apa tandaan pada lima batang anak kunci ini.

[38] But when exh 'P61' was shown to SP6, he found a date 28 October (which has no relevance to the case at hand) and the letter 'E' on one of the keys and a number which cannot be read. At pp 161–162 of the appeal record at *Jilid* II, this was what SP6 testified in examination-in-chief:

> P61 telah ditunjukkan kepada saya dan ia telah dikemukakan sebagai barang kes. P61 adalah serangkai lima anak kunci yang dirampas dari rumah OKT. Ada tarikh 28/10 tetapi tahun tidak dapat dibaca, di dua daripada lima batang anak kunci ini dan salah satu dari dua batang anak kunci ini ada juga tandaan E. Tandaan E ini diikuti dengan satu angka yang tidak dapat dibaca.

[39] SP8 worsened the situation when he testified that exh 'P61' was different from that of exh 'P7(1)' (which is a photograph of the keys to the apartment taken by Detective Lance Corporal 109934 Abdul Razak bin Shaari ('SP1')) and item 35 of exh 'P46' (*Borang Penyerahan Barang Kes*). At pp 210–211 of the appeal record at *Jilid* II, this was what SP8 testified in examination-in-chief:

> Gambar kunci dalam photo P7(1) kelihatan tidak serupa seperti 5 anak kunci yang terdapat dalam rangkaian anak kunci P61. Ini kerana anak kunci yang terpanjang dalam P61 adalah berbeza dengan anak kunci terpanjang dalam gambar P7(1) kerana di dalam gambar terdapat gigi kunci tersebut. Manakala kunci P61 yang ada pada saya ini tidak ada gigi pada hujung anak kunci yang panjang itu. Maka itu saya mengatakan anak kunci itu tidak serupa. Kepala kepada anak kunci itu juga tidak

serupa. Kepala kunci dalam gambar berbentuk leper manakala anak kunci di P61 berbentuk bulat. Oleh itu anak kunci ini berbeza dari kunci di dalam gambar P7(1). Kunci yang saya pegang ini di P61 adalah bagi pintu grill. Lain-lain anak kunci yang terdapat dalam rangkai anak kunci P61 saya tidak dapat melihat apa perbezaannya. Bagi empat anak kunci di P61 saya tidak tahu apa kegunaan 4 anak kunci tersebut kerana saya tidak mengujinya.

[40] And SP8 also found the signature of Chief Inspector Najaram (who is neither a witness nor relevant to this case) on exh 'P61'. Under cross-examination, at pp 215–216 of the appeal record at *Jilid* II, this was what SP8 testified:

Q: P61 dirujuk semula kepada saksi. Tandatangan dalam setiap batang anak kunci dalam P61 ada tandatangan Cif Inspektor Najaram?

J: Hanya satu kunci sahaja dalam lima batang anak kunci ini saya kenal ada tandatangan Cif Inspektor Najaram.

Q: Pada masa itu Cif Inspektor Najaram pegang jawatan sebagai Pegawai Operasi/Siasatan Jabatan Narkotik IPK Pulau Pinang?

J: Ya.

Q: Cif Inspektor Najaram tidak mempunyai apa-apa peranan dalam kes ini langsung baik atas apa kapasiti?

J: Ya, tidak ada.

[41] The High Court judge acknowledged that exh 'P61' could have been tampered with but His Lordship nevertheless held that this issue did not affect the prosecution's case. At p 49 of the appeal record at *Jilid* I, this was what His Lordship said:

Kehadiran kunci P61(1) yang mempunyai tandatangan Inspektor Rajaram dengan itu tidak mencacatkan kes pendakwaan walau pun mahkamah berpendapat kecuaian sedemikian tidak seharusnya berlaku dalam pasukan polis. Tidak keterlaluan jika mahkamah ini mengatakan seseorang telah menggantikan kunci P61(1) yang dikemukakan di mahkamah bagi menggantikan kunci grill yang terdapat dalam gambar P6(G) dan P7(1) yang merupakan kunci asal grill tersebut.

[42] According to the High Court judge, it made not a whit of a difference that someone had substituted the keys in exh 'P61(1)' which were tendered in court as the original keys to the apartment when in fact the original keys are reflected in photographs 'P6(G)' and 'P7(1)'.

[43] Mr Gooi Soon Seng, learned counsel for the appellant, submitted that the apartment keys in exh 'P61' could have been tampered with and that would render the production of the padlock (which was brought back by SP8 after he

visited the apartment) as an exhibit in court as imperative. The production of the padlock would certainly verify the authenticity of exh 'P61'. But this, unfortunately, was not done by the prosecution.

[44] Reference will now be made to exh 'D73', which is a letter dated 27 September 2006 from the then defence counsel addressed to the Head of the Prosecution Unit, Attorney-General's Chambers. Exhibit 'D73' enclosed the Statutory Declaration of SD2 that was subscribed and solemnly declared on 26 September 2006, and it was suggested that SD2's statement, if found necessary, to be recorded under s 112 of the Criminal Procedure Code for the benefit of the relevant people. The statutory declaration of SD2 was also marked, as exh 'D73A' and it was worded as follows (see pp 360–363 of the appeal record at *Jilid* III):

STATUTORY DECLARATION

I, Poh Hoay Leng (NRIC NO: 741016–07–014) of AZ-3–1, Taman Tun Sardon, 11700 Gelugor, Pulau Pinang do solemnly and declare as follows:

1. I am married and my husband is Ooi Choo Hock (NRIC NO: 700210–07–5041).
2. On 8th of October, 2002, my husband was arrested by the Police at 23–11–18, Taman Lone Pine, Air Itam, Pulau Pinang and subsequently charged for trafficking in dangerous drugs.
3. On the same day, I was also arrested by the Police and detained under the Dangerous Drugs (Special Preventive Measures Act). I was subsequently released by the Police without any charges being laid against me.
4. I was arrested at my residential address 23–11–23, Taman Lone Pine, Air Itam, Pulau Pinang on the same day, i.e. 8th of October, 2002.
5. The above address is my marital home. I have resided at the present address with my husband since our marriage. My husband has no other residential address.
6. The apartment at 23–11–18, Taman Lone Pine, Air Itam, Pulau Pinang was rented by the cousin of my husband named Ah Hooi. He stays there with his girlfriend, who is of Thai nationality.
7. Ah Hooi rented the apartment from the year 2000 and lives there with his Thai girlfriend.
8. My husband arranged for the rental of the apartment 23–11–18, Taman Lone Pine, Air Itam for his cousin, Ah Hooi, through a broker by the name of Peter.
9. As my husband's cousin, Ah Hooi was frequently away on business, he used to pay the rental to my husband every 2 months to be forwarded to Peter.
10. The physical description of Ah Hooi is a person of average build, slightly on the thin side and has hair of golden brown.

11. My husband, on the other hand had hair of black average colour at the material time. My husband has never dyed his hair before.

12. Peter's apartment is in front of my apartment and we have to pass Ah Hooi's apartment on the way to the lift or elevator.

13. Occasionally when Ah Hooi goes outstation, mostly to Thailand with his girlfriend, he deposits the keys to apartment 23–11–18, Taman Lone Pine, Air Itam, Pulau Pinang in my apartment, sometimes with me and sometimes with my husband.

14. I have been to apartment no. 23–11–18, Taman Lone Pine and I have met Ah Hooi and his Thailand girlfriend in that apartment. I have also seen Ah Hooi's friends, a few Chinese and Thailand nationals in the apartment, I believe they occasionally stay there as I have seen clothes and mattresses in the hall of the apartment.

15. Ah Hooi's apartment is furnished with mattresses, cupboard and men's and women's clothes all over the apartment.

16. After I was arrested, I was brought to Ah Hooi's apartment. I saw my husband in handcuffs, mattresses, a rice cooker, household appliances and a few chairs in the apartment. They, the Police asked my husband to try the clothes found in the apartment but the clothes could not fit my husband. I witnessed the Police trying the ill-fitting clothes on my husband.

17. On the day of my arrest, at around 9.00 am in the morning, Ah Hooi left the apartment keys with me as he was going to Thailand with his girlfriend for some work for a few days.

18. I noticed some suspicious people in the passageway to our apartment during that particular day.

19. In the afternoon, when my husband came home, I gave Ah Hooi's apartment keys to my husband to check Ah Hooi's apartment.

20. Subsequently, I was arrested after that and taken to Ah Hooi's apartment where I found my husband in handcuffs.

21. I did not make a statement earlier as I was waiting for the Police to record a statement from me which they have never done till today.

A

Subscribed and solemnly)
Declared by the abovenamed)
at Georgetown in the State of)
B Penang this day of 26) *Sgd. (Illegible)*
September, 2006.) POH HOAY LENG

C

BEFORE ME,
Sgd. (Illegible)
COMMISSIONER
OF OATHS.

D

[45] Exhibits 'D73' and 'D73A' were introduced by learned defence counsel during the cross-examination of SP8, who as the investigating officer, had these exhibits in his possession. SP8 admitted that he did not conduct any investigation in regard to exh 'D73A'. The following recordings were made by the High Court judge as seen at p 222 of the appeal record at *Jilid* II:

E

F

Mahkamah: Surat bertarikh 27/9/2006 dan lampirannya iaitu Akuan Bersumpah yang diikrarkan pada 26/9/2006 dibenarkan untuk ditandakan sebagai dokumen eksibit pembelaan tertakluk kepada pembuktian isi kandungan surat (Akuan sumpah sebagai isu yang berasingan).

Mahkamah: Surat bertarikh 27/9/2006 — D73.

G

Akuan Berkanun bertarikh 26/9/2006 — D73A.

[46] At the end of the prosecution's case, the High Court judge rejected exhs 'D73' and 'D73A' from being considered by His Lordship. At p 246 of the
H appeal record at *Jilid* II, this was what His Lordship said:

Oleh itu mahkamah mengenepikan D73 dan D73A dari pertimbangan mahkamah.

[47] Exhibit 'D73A' was subscribed and solemnly declared by SD2 on 26
I September 2006. The date of the offence was on 8 October 2002 and calculation wise, exh 'D73A' was made some three years 11 months and 18 days from the date of the offence. And this delay was alluded to by the High Court judge in his written grounds of judgment as seen at pp 54–57 of the appeal record at *Jilid* I, and for convenience, it will now be reproduced:

47. Di atas keputusan dan kaedah yang dinyatakan dalam kes *PP v Lin Lian Chen* tersebut maka pihak pembelaan mengemukakan surat bertarikh 27.9.2006 dan Akuan Berkanun bertarikh 26.9.2006 bagi dijadikan kes pembelaan bagi tujuan membentuk sebahagian daripada kes pembelaan di peringkat kes pendakwaan lagi. Peguam menghujahkan berdasarkan kepada keputusan kes *PP v Lin Lian Chen* tersebut, surat dan Akuan Berkanun yang ada di bawah kawalan pegawai penyiasat SP8 layak untuk diterima masuk sebagai dokumen pembelaan bagi dijadikan eksibit pembelaan.

48. Mahkamah telah membenarkan surat dan Akuan Berkanun itu diterima masuk dan ditandakan sebagai eksibit pembelaan setelah berpuas hati dengan keterangan dan pengakuan SP8 bahawa beliau ada menerima surat dan Akuan Berkanun tersebut dan menjadikannya sebahagian daripada dokumen kertas siasatan kes. Surat bertarikh 27.9.2006 telah ditandakan sebagai D73 dan Akuan Berkanun ditandakan sebagai D73A.

49. Mahkamah juga memaklumkan kepada pihak-pihak bahawa keputusan atau ruling mahkamah dalam perkara penerimaan masuk D73 dan D73A tersebut akan dikaji semula dan meminta pihak-pihak menghujahkan dengan lebih mendalam di akhir kes pendakwaan.

50. Setelah meneliti hujahan pihak-pihak, mahkamah berpendapat D73 dan D73A tersebut tidak berkelayakan untuk diterima masuk sebagai keterangan yang admissible di atas alasan-alasan yang berikut yang akan dihuraikan oleh mahkamah ini.

51. Tertuduh telah ditangkap pada 8.10.2002. Surat peguam D73 bertarikh 27.9.2006. Akuan Berkanun (D73A) diikrarkan pada 26.9.2006. Terdapat jarak masa hampir empat tahun bagi surat dan Akuan Berkanun tersebut dengan tarikh tangkapan tertuduh. Oleh yang demikian surat dan Akuan Berkanun tersebut tidak jatuh kepada dokumen yang boleh dikatakan sebagai kontemporari.

52. Akuan Berkanun D73A adalah merupakan nyataan berkanun yang dibuat oleh Poh Hoay Ling. Poh Hoay Ling tidak dipanggil oleh pihak pendakwaan sebagai saksi. Oleh yang demikian dengan memasukkan Akuan Berkanun yang diikrarkan oleh Poh Hoay Ling adalah suatu usaha oleh pihak pembelaan secara tidak langsung memaksa pihak pendakwaan mengemukakan keterangan yang pihak pendakwaan tidak berhasrat mengemukakannya dalam menjalankan kuasa budibicaranya ke atas perjalanan dan pengemukaan keterangan kes pendakwaan. Di bawah undang-undang pihak pendakwaan tidak boleh dipaksa memanggil saksi yang tidak mahu dipanggil oleh pihak pendakwaan. Kawalan dan imbangan ke atas perjalanan hak budibicara pihak pendakwaan itu adalah tertakluk kepada peruntukan seksyen 114(g) Akta Keterangan, 1950 iaitu peruntukan 'adverse inference' jika ianya bermerit.

53. Akuan Berkanun oleh Poh Hoay Ling tidak boleh disamakan dengan status percakapan beramaran tertuduh sendiri yang hendak dikemukakan sebagai keterangan pembelaan tertuduh yang mana undang-undang memberi hak kepada tertuduh bagi mengemukakan percakapan beramaran beliau itu di peringkat kes pendakwaan lagi jika berhasrat berbuat demikian dan boleh juga dikemukakan di peringkat pembelaan diri beliau.

54. Di dalam kes *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 isu berkaitan beban bukti ke atas dokumen yang hendak dikemukakan oleh plaintif sebagai eksibit bagi menyokong tuntutan plaintif dalam kes tersebut telah dibincangkan oleh YA Shankar J yang memutuskan seperti berikut:

'a document cannot be permitted into evidence and marked as such until it has been properly proved.'

55. Di dalam kes *PP v Lin Lian Chen* dokumen yang dirujuk yang dikemukakan adalah merupakan percakapan beramaran tertuduh sendiri. Mahkamah juga dalam kes tersebut telah membenarkan dokumen yang dijumpai oleh pegawai serbuan semasa tangkapan dan rampasan diterima masuk sebagai dokumen pendakwaan. Walau bagaimanapun penerimaan masuk dokumen tersebut tidak bermakna isi kandungan dokumen sebagai telah disifatkan sebagai telah dibuktikan kerana kaedah pembuktian ke atas kandungan masih perlu dibuktikan.

56. Oleh yang demikian di atas alasan (i) D73 dan D73A bukanlah dokumen kontemporari yang berada dengan SP8 (ii) D73 dan D73A bukan merupakan dokumen yang ditemui dan dirampas oleh pegawai serbuan di tempat kejadian, (iii) D73A bukan merupakan percakapan penyiasatan oleh tertuduh, (iv) penama yang mengikrarkan Akuan Berkanun tersebut bukan merupakan saksi pihak pendakwaan yang bermakna pembuat (maker) D73A tidak dipanggil bagi mengemukakan dokumen itu, maka D73 dan D73A tersebut tidak layak diterima masuk (not admissible) untuk menjadi eksibit pembelaan di peringkat kes pendakwaan tersebut.

57. Oleh itu mahkamah mengenepikan D73 dan D73A dari pertimbangan mahkamah.

[48] It is trite law that the defence is entitled, though cross-examination of the prosecution witnesses, to put its case at the earliest possible stage. The defence is entitled, as of right, to elicit oral as well as documentary evidence by way of cross-examination of the witnesses for the prosecution in order to either destroy the case for the prosecution, or to support its own case. Edgar Joseph Jr SCJ in *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 1 CLJ (Rep) 285, writing for the Supreme Court, explained the law lucidly in this way (see pp 568–569 (MLJ); pp 292–293 (CLJ) of the report):

> A final point needs to be made. The trial Judge appreciated correct law when he held, as he did in fact hold, that the defence are entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in Court for the first time when the accused makes his defence from the witness box or the dock, so that the prosecution is taken by surprise, the accused runs the risk of being criticised for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention. Accordingly, we respectfully agree with Suffian LP when he said in *Mohd Noor bin Jantan*'s case:

The prosecution is free to tender or not in evidence the cautioned statement; but if the recording officer gives evidence the defence is entitled to cause him to tender it in evidence even though the prosecution does not itself want to introduce it as part of its case.

But, in the very next sentence, Suffian LP went on to say:

But if the recording officer is not called by the prosecution he must be called by the defence during the course of the defence case for this purpose.

It is this sentence, which gave rise to a difficulty both in the Court below and before us, since it implies that a cautioned statement cannot be introduced in evidence through anyone other than the recording officer. We note, that further down in his judgment, Suffian LP did add something which, with respect, appears to be somewhat inconsistent with what he had said in the passage reproduced above. What he added was something which we consider both sound and wholesome and it was this:

… In our judgment it is immaterial whether or not the statement is a public document — for the principle is that a witness who has any document which is within his possession or power which is required by the defence and which is material to the defence, is bound to produce, and this rule applies whether or not the document is public or private — save that in the case of a document within the possession or power of Government, Crown Privilege may in certain circumstances be claimed. And it is not suggested that the cautioned statement here is protected by Crown Privilege.

If, subject to the consideration of privilege, the defence is entitled — and we consider it plainly is — to elicit by cross-examination of prosecution witnesses, oral evidence, which goes either to destroy the case for the prosecution, or to support its own case, we fail to see why, it may not elicit, in the same way, documentary evidence, for the same purpose, as we see no distinction in principle between the two situations. Where, of course, a document is elicited in this way, on general principle, its author would have to be called unless he is dead or untraceable or cannot for any other satisfactory reason be called, in which case someone having personal knowledge of the contents thereof (see eg *Tan Siak Heng v Rex* [1950] 1 MLJ 214) or saw him write it or is acquainted with his handwriting, would have to be called to prove its contents.

To recapitulate, in the present case, it will be recalled that the prosecution had called the investigation officer (who had in his possession or under his control the cautioned statement of the respondent), but not the recording officer. Counsel for the respondent had then sought to introduce the cautioned statement by way of cross-examination of the investigation officer. The trial Judge acceded to that request, over the objection of the learned Deputy, the cautioned statement having been marked as a defence exhibit, being Exhibit D22. In this, we consider, the trial Judge was entirely correct for even though the recording officer had not been called by the prosecution, the statement was that of the respondent who had personal knowledge of the facts stated therein and who had authenticated it by signing it. In other words, it was the respondent who was the author thereof and who had himself

wished it to be admitted, it being acknowledged by him in the cautioned statement itself, that it was made voluntarily after due administration of the statutory caution.

[49] Here, we are concerned about the statutory declaration of SD2 in exh 'D73A'. SD2 was the author of exh 'D73A' and she had personal knowledge of the facts stated therein. SD2 also wanted exh 'D73A' to be admitted as a defence exhibit during the course of the prosecution's case via the cross-examination of SP8.

[50] It matters not that exh 'D73A' is not the cautioned statement of the appellant. The rule that the defence case must be put across to the prosecution witnesses apply equally to the statutory declaration in exh 'D73A', bearing in mind that SD2 had signed the said document and knew its contents. In our judgment, the High Court judge erred in rejecting exh 'D73A' to be admitted as a defence exhibit at the close of the prosecution's case and this must be construed, with respect, as an obstruction to the defence to put forward its case at the earliest possible stage (*AEG Carapiet v AY Derderian* 1961 AIR Cal 359; *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29; *Re Pichi Muthu* [1970] 2 MLJ 143; *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC); *Public Prosecutor v Low Aik Boon (2)* [1990] 2 CLJ (Rep) 760; *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639(CA); *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705(FC); *Public Prosecutor v Abang Abdul Rahman* [1982] 1 MLJ 346; *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; and *Public Prosecutor v Muhamad Suhaimi bin Abdul Aziz* [2002] 5 MLJ 233; [2002] 2 CLJ 209).

[51] Now, when the appellant called SD2 as his witness, the content of exh 'D73A' crystallised into evidence. As the author of exh 'D73A', SD2 affirmed the content of exh 'D73A'. Seen in this context, the High Court judge erred in not admitting exh 'D73A' at the end of the defence case. In our judgment, the rejection of exh 'D73A' as evidence has occasioned a serious miscarriage of justice. It warrants interference by this court.

[52] The appellant's petition of appeal contained two paragraphs in regard to exhs 'D73' and 'D73A' and they can be seen in paras 9 and 15. For convenience, they will now be reproduced in their original text, and we have dealt with these issues in the preceding paragraphs:

> 9. Yang Arif Hakim telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa D73 dan D73A tidak berkelayakan untuk diterima masuk sebagai keterangan yang admissible.
>
> 15. Yang Arif Hakim telah terkhilaf dari segi undang-undang dan fakta apabila gagal mengambilkira D73 dan D73A pada peringkat pembelaan perayu.

[53] The petition of appeal also carried an additional ground and it was worded as follows:

> That the learned trial Judge erred in law and in fact when he failed to appreciate that there are serious doubts as to the identity of the drug exhibits and as such the prosecution cannot be said to have proven its case beyond reasonable doubt.

[54] Mr Hisyam Teh Poh Teik, also acting for the appellant, submitted along the following lines. That the case for the prosecution revealed several unexplained discrepancies with regard to the drug exhibits that were produced before the High Court to the extent that the integrity of the drug exhibits have been compromised. That these discrepancies have the effect of going to the root of the prosecution's case to such an extent that the prosecution had not proven its case beyond reasonable doubt. In the light of these unexplained discrepancies, the defence of the appellant ought not to be called in respect to all the five charges.

[55] For clarity, the various discrepancies will now be considered, not in its order of priority.

(a) The discrepancies in regard to the number of pills seized

[56] Under this head, it is ideal to consider:

(a) *The police report marked as exh 'P64'*

[57] This police report can be seen at pp 343–345 of the appeal record at *Jilid* III. At p 345, in particular, the total number of estacy pills are listed at 4,415 pills.

[58] But the breakdown of the number of pills listed at p 345 of the appeal record at *Jilid* III, exceeded more than 4,415 pills. The correct number of pills seized came up exactly to 4,526 pills. The breakdown will now be reproduced:

(i)	27.1	C15-C2	.....	2971 pills
(ii)	27.1	C15-D1	.....	1069 pills
(iii)	27.1	C15-E2	.....	100 pills
(iv)	27.1	C15-F1	.....	50 pills
(v)	27.1	C15-F2	.....	81 pills
(vi)	27.1	C15-F3	.....	81 pills
(vii)	27.1	C15-F4	.....	50 pills
(viii)	27.1	C15-F5	.....	50 pills
(ix)	27.1	C15-F6	.....	11 pills
(x)	27.1	C15-F7	.....	50 pills
(xi)	27.1	C15-F8	.....	13 pills
			Total	4526 pills.

(b) *The 'Surat Akuan Terima' police report marked as exh 'P64'*

[59] This can be seen at pp 346–349 of the appeal record at *Jilid* III. It shows the total number of pills to be 4,415 pills. Calculation wise, the total number of pills was obtained by adding up the pills listed at p 348 of the appeal record at *Jilid* III, and it will now be demonstrated:

(i)	27.6	C15-D1	.....	2971 pills
(ii)	27.7	C15-D2	.....	1069 pills
(iii)	27.10	C15-F1	.....	100 pills
(iv)	27.11	C15-F2	.....	50 pills
(v)	27.12	C15-F3	.....	81 pills
(vi)	27.13	C15-F4	.....	50 pills
(vii)	27.14	C15-F5	.....	50 pills
(viii)	27.15	C15-F6	.....	11 pills
(ix)	27.16	C15-F7	.....	20 pills
(x)	27.17	C15-F8	.....	13 pills
			Total	4415 pills.

(c) The chemist report marked as exh 'P15'

[60] This chemist report was prepared by SP4. It can be seen at pp 328–333 of the appeal record at *Jilid* III. The chemist report categorically states that the total number of pills to be 4,455. This quantum is arrived at by adding up all the pills as alluded to at pp 331–333 of the appeal record at *Jilid* III. And it will now be reproduced accordingly:

(i)	(6)	.....	2971 pills
(ii)	(7)	.....	1069 pills
(iii)	(10)	.....	100 pills
(iv)	(11)	.....	50 pills
(v)	(12)	.....	71 pills
(vi)	(13)	.....	50 pills
(vii)	(14)	.....	100 pills
(viii)	(15)	.....	11 pills
(ix)	(16)	.....	20 pills
(x)	(17)	.....	13 pills
		Total	4455 pills.

[61] The prosecution tendered these three contemporaneous documents, namely, exhs 'P64', 'P65' and 'P15' and three different figures with regard to the number of pills surfaced. The discrepancies in regard to the number of pills seized have not been explained. It is an omission that is fatal to the prosecution's case.

(b) The discrepancies in regard to the gross weight of the other drugs guite apart from the pills

[62] This discrepancies relate to the gross weight of the other drugs. To appreciate the discrepancies, it is ideal to compare the oral evidence of the government chemist ('SP4') as seen at pp 128–129 of the appeal record at *Jilid* I with that of the 'Polis 31' marked as exh 'P70A' which can be seen at pp 356 to 357 of the appeal record at *Jilid* III. The 'Polis 31' is a form from the police addressed to the Chemistry Department requesting the latter to do an analysis on the drugs submitted by the police. It is now ideal to tabulate the comparison between the evidence of the government chemist ('SP4') with that of 'Polis 31':

"Gross weight stated by chemist					Gross weight stated in Polis 31				
1.	EA-1 -	501.48 gm	-	pg 128	1.	EA-1 -	508 gm	-	pg 356
2.	EA-2 -	2123.7 gm	-	pg 128	2.	EA-2 -	2500 gm	-	pg 356
3.	EB-4 -	46.46 gm	-	pg 128	3.	EB-4 -	46 gm	-	pg 356
4.	EB-5 -	27.77 gm	-	pg 128	4.	EB-5 -	34 gm	-	pg 356
5.	EB-6 -	44.86 gm	-	pg 128	5.	EB-6 -	44 gm	-	pg 356
6.	EB-7 -	35.22 gm	-	pg 128	6.	EB-7 -	35 gm	-	pg 356
7.	EB-8 -	30.9 gm	-	pg 129	7.	EB-8 -	30 gm	-	pg 356
8.	EB-9 -	36.44 gm	-	pg 129	8.	EB-9 -	46 gm	-	pg 356
9.	EB-10-	31.79 gm	-	pg 129	9.	EB-10-	32 gm	-	pg 356
10.	EB-15-1	506.22 gm	-	pg 129	10.	EB-15-1	508 gm	-	pg 356
11.	EB-15-2	348.28 gm	-	pg 129	11.	EB-15-2	352 gm	-	pg 356
12.	No weight given				12.	EB-15-5	562 gm	-	pg 356
13.	EB-15-8	394.94 gm	-	pg 129	13.	EB-15-8	401 gm	-	pg 356
14.	EB-15-9	94.02 gm	-	pg 129	14.	EB-15-9	94 gm	-	pg 357
Total: 4222.08 grammes					Total (without adding item 12): 4630.00 grammes."				

[63] By substracting 4,630.00g with that of 4,222.08g, the discrepancies came up to 407.92g. It is a huge amount and it has not been explained by the prosecution.

(c) The discrepancies between the search list in exh 'P63' and the police report in exh 'P64'

[64] The search list marked as exh 'P63' can be seen at pp 339–342 of the appeal record at *Jilid* III, while the police report marked as exh 'P64' is found at pp 343–345 of the appeal record at *Jilid* III. The discrepancies refer to the drug found in the plastic listed in the search list at p 341 of the appeal record at *Jilid* III as 'C15–A2' and the weight itemised therein as 352g, while the same drug mentioned in the police report at p 345 of the appeal record at *Jilid* III was described as 302g. The discrepancies came up to 50g and it was not explained by the prosecution.

(d) The discrepancies between the police report in exh 'P64' and the 'Surat Akuan Terima' in exh 'P65'

[65] Both the police report and the 'Surat Akuan Terima' are found in the appeal record at *Jilid* III. The discrepancies between these two contemporaneous documents are itemised below in a table for easy reference and the pages mentioned therein refer to the appeal record at *Jilid* III:

Exhibits	Police Report Exhibit 'P64'	Surat Akuan Terima Exhibit 'P65'	Discrepancies
(a) C15-A2	302 gms (pg 345)	352 gms (pg 348)	50 gms
(b) C15-C 1	562 gms (pg 345)	384 gms (pg 348)	178 gms

[66] Exhibit 'C15–C1' as alluded to in the table for both the police report and the 'Surat Akuan Terima' carried the following description: 'Satu botol plastik putih mengandungi serbuk putih.'

[67] But the discrepancies in the weight as stated in the table for exh 'C15-C1' have not been explained by the prosecution. Since the contemporaneous documents contradict one another, the effect is that there is no credible evidence tendered by the prosecution. In this connection, reference to the case of *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322; [1993] 2 CLJ 534 should be made. There, Vincent Ng Kim Khoay JC (later JCA) at pp 33–334 (MLJ); p 540 (CLJ) had this to say:

> The function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged. If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

[68] A classic example would be the case of *Lee Chee Meng v Public Prosecutor*, where the court was confronted by three versions given by different witnesses for the prosecution in regard to the number of packets of drugs seized and received. The arresting officer ('PW2') testified that he recovered a total of 61 packets. The investigating officer ('PW6'), on the other hand, said that there were a total of 76 packets. While the government chemist ('PW5') testified that he received a total of 64 packets for analysis.

[69] It goes without saying that material contradictions or discrepancies or omissions must be construed in favour of the defence (*Yusoff bin Kassim v Public Prosecutor* [1992] 2 MLJ 183(SC); *Public Prosecutor v Lee Eng Kooi*; *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 4 AMR 709 (FC); *Adzhaar bin Ahmad & Anor v Public Prosecutor* [1996] 4 MLJ 85; *Public Prosecutor v Tai Mei Yuen* [2004] 4 MLJ 541; *Periasamy v Public Prosecutor* [1966] 1 MLJ 138 (FC); *Harchand Singh and another v State of Haryana* 1974 AIR 344 (SC); and *Public Prosecutor v Rajandiran a/l Kadirveil* [2002] 7 MLJ 77).

[70] Here, the discrepancies in regard to the drug exhibits are so serious that they strike at the very core of the prosecution's case. The prosecution ventured no explanation for the various discrepancies highlighted in the preceding paragraphs. With these inherent discrepancies, there was no prima facie case and the defence should not have been called.

[71] In *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348 (FC), the discrepancies were in regard to the number of 'ketulan' of

the cannabis seized with that of its gross weight. While the original charge preferred against the appellants alluded to the number of 'ketulan' to be exactly six, yet the oral evidence of the relevant prosecution witnesses showed that it was only two.

[72] And the gross weight of the cannabis as mentioned in the original charge tallied with the evidence of PW8 and that was 880g. But, the government chemist ('PW2') testified that the gross weight was only 829.49g.

[73] Since there was no explanation advanced by the prosecution in regard to the discrepancies, the Federal Court held that it was fatal and acquitted both the appellants although the prosecution's case against both the appellants was strong as it was a case based on the evidence of an agent provocateur. The relevant paragraphs in the judgment of the learned Chief Justice in *Zaifull bin Muhammad v Public Prosecutor and another appeal* will now be reproduced (see pp 358–360):

> (33) In the present case, there are two material discrepancies that is as to the number of 'ketulan' and as to the gross weight of the cannabis. Both these discrepancies were never explained by the prosecution, save to say that the charge referred to by learned counsel was the original charge, and the charge was later amended to read as trafficking in 799.4g of cannabis. It was further contended by the prosecution that since the amended charge is based on the net weight, therefore, any discrepancy in the gross weight is immaterial.
>
> (34) The prosecution further argued that based on the evidence before the court, there is no break in the chain of the evidence with regard to the drug exhibit. The prosecution submitted that all the relevant witnesses called by the prosecution had positively identified the drug exhibit based on the contemporaneous markings made by the witnesses. On that premise, the prosecution contended that the discrepancies do not create any doubt in the identity of the drug exhibit.
>
> (35) With respect, we could not agree with the prosecution on this issue. We are of the view that, in the circumstance of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibit. In the circumstance, the defence should not have been called at the close of the prosecution case.
>
> (36) In *Yeong Kia Heng lwn Pendakwa Raya* [1992] 1 MLJ 327; [1992] 1 CLJ 364, like in the present case, there was a discrepancy in the weight of the drug exhibit between the police and the chemist. The former Supreme Court held that the difference in weight had cast a reasonable doubt on the identity of the drug exhibit. On that premise, the Supreme Court held that the appellant ought not to have been called to enter his defence. Similarly in *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212; [2009] 4 CLJ 246, the Federal Court again found that because of the discrepancy in weight of drug exhibit as found by the police as against the chemist, the Federal Court held that that gave rise to a serious doubt on the identity of the

drug exhibit and allowed the appeal by the accused. Zulkefli Makinudin FCJ, in delivering judgment of the court had this to say:

We agree with the contention of the appellant that there is a serious doubt as to the weight of the cannabis, thus affecting the identity of the cannabis. According to the chemist (PW3) the total weight of the cannabis is 224.65g. The weight of 224.65g is obtained by adding the weight of the cannabis placed on the newspaper which is 151.08g and the cannabis from the 40 plastic packets which is 73.75g. However, exh P15 (Borang Serah Menyerah) stated that the weight of the cannabis to be 140g (on the newspaper) and 65g (in the 40 packets) making the total gross weight to be 205g. This would mean that by the time the cannabis reached the hands of the chemist the cannabis has increased in weight by 19.65g.

(37) Our attention was drawn to the case of *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345 where the Federal Court held that even though there existed a discrepancy in the weight of the drug exhibit as found by the police and the chemist, the High Court as a fact that there was no doubt in the identity of the exhibit because the evidence before the court showed that there was no break in the chain of evidence. Having considered these three previous decisions, we agree with the reasoning in *Yeong Kia Heng lwn Pendakwa Raya*. In our view, it is a contradiction in terms, to say that there is no break in the chain of evidence, when in fact there exists material discrepancy as to the weight of the drug exhibit. In any event, in the present case the discrepancies are not only as regard to the gross weight but also as to the number of 'ketulan'. In our view, these are material discrepancies that go to the issue of identity of the drug exhibit. In the circumstances, therefore, it cannot be said that there is no break in the chain of evidence. On that premise, we hold that it would not be safe to uphold the convictions.

CONCLUSION

(38) In the upshot, the appeals are allowed and the conviction and sentence imposed by the High Court, which were affirmed by the Court of Appeal, are set aside. The appellants are acquitted and discharged.'

The learned deputy public prosecutor in the person of Madam Azlina bt Rasdi invited us, notwithstanding the discrepancies in the prosecution's case, to invoke the proviso to s 60(1) of the Courts of Judicature Act 1964 ('CJA') and dismiss the appeal of the appellant. In a situation where the proviso to s 60(1) of the CJA applies, the conviction will be confirmed. We declined the invitation of the learned deputy public prosecutor. The proviso to s 60(1) of the CJA reads as follows:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[75] The test is whether there has been a substantial miscarriage of justice. And it depends entirely on the circumstances of the case before the court exercises its discretion to invoke the proviso to s 60(1) of the CJA. Reference to

some pertinent authorities will now be made. The appellant in *Mohd Taufiq Mani b Abdullah lwn Pendakwa Raya* [2002] 1 AMR 877 (CA), was arrested while he was carrying a plastic bag which contained, inter alia, a 'Breeze' soap powder box which had three yellow packets containing the drugs. The court refused to invoke the proviso.

[76] Approximately 81.58g of heroin were recovered from the body of the appellant in the case of *Abillah Labo Khan v Public Prosecutor* [2002] 3 MLJ 298; [2002] 3 CLJ 521(CA), and there was a breach of the rule against double presumption. On appeal, the prosecution sought to invoke the proviso but the Court of Appeal refused to do so.

[77] The appellant in *Arumugam Periasamy v Public Prosecutor* [2005] 3 CLJ 685(CA), was arrested while riding a motorcycle and the drugs were found in a package in the carrier basket of the motorcycle. The appellant also put up a struggle and attempted to escape. And the Court of Appeal refused to apply the proviso.

[78] The proviso was also not invoked in *Chan Kheng Nam lwn Public Prosecutor* [2002] 1 CLJ 553,(CA) and in *Haryadi bin Dadeh v Public Prosecutor* [2000] 4 MLJ 71; [2000] 3 AMR 3396(FC). It was also not invoked by the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203.

[79] However, in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 AMR 577 (FC) the Federal Court applied the proviso to s 92(1) of the CJA which is on all fours with the proviso to s 60(1) of the CJA. In that case, the drugs were found in the stomachs of the appellants after they have swallowed them. Actual possession was also proven and the evidence was overwhelming.

[80] Here, before us, Mr Hisyam Teh Poh Teik argued that the proviso to s 60(1) of the CJA should not be invoked because just like the case of *Zaifull bin Muhammad*, the prosecution failed to establish a prima facie case and the serious doubts as to the identity of the drug exhibits impinged on the prosecution's case. And we agreed with him. Here, there was a substantial miscarriage of justice.

CONCLUSION

[81] For these varied reasons, we unanimously allowed the appellant's

appeal. The convictions and sentences imposed by the High Court judge were set aside. We acquitted and discharged the appellant forthwith. We set him free.

Allowing the appeal.

Reported by Afiq Mohamad Noor